BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33183

DAVID R. KYLE,

Appellant,

v.

DANA TRANSPORT, INC., a New Jersey corporation authorized to do business in the State of West Virginia, and RONNIE DODRILL,

Appellees.

Appeal from the Circuit Court of Putnam County, West Virginia

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BRIEF OF APPELLEES

Thomas H. Peyton, Esquire
PEYTON LAW FIRM
Post Office Box 216
2801 First Avenue
Nitro, WV 25143
WV State Bar No. 8841
Telephone: (304) 755-5556
Telefax: (304) 755-1255
Counsel for Appellees

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BRIEF OF APPELLEES

I. Kind of Proceeding and Nature of Ruling Below

On February 3, 2000, the Appellant, David R. Kyle, a master electrician, was dispatched by his employer, Al Marino, Inc., to examine and repair an electrical problem in the maintenance building owned by Appellee, Dana Transport, Inc., located in Nitro, Putnam County, West Virginia.

The Appellant was told that Appellee, Dana Transport, Inc., was having a circuit breaker problem. Prior to the 3rd day of February, 2000, Appellant had not performed any prior work on this electrical panel in the maintenance building. When the Appellant

examined the panel, he saw that the cover on the electrical panel had been removed. Further, the Appellant noticed the screw was loose on one of the mounting fingers of the breaker and as he tightened it up, the Appellant was electrocuted. Despite an extensive time period for the conducting of discovery, the Appellant has been unable to determine a cause for this accident.

The trial in this case was continued on multiple occasions by agreement of the parties with trial by jury eventually scheduled for February 4, 2003. In anticipation of trial, the Appellant disclosed his expert witnesses by letter dated February 1, 2002. (See Appellant's disclosure of expert witnesses attached hereto as **EXHIBIT "A"**.) The Appellant designated Matthew Balmer as an expert witness but provided no explanation as to his area of expertise or what opinions he may render at trial. Therefore, on the 6th day of February, 2002, the Appellees served their Second Set of Interrogatories requesting various information regarding Mr. Balmer, including the subject matter on which he is expected to testify and the substance of the facts and opinions to which Mr. Balmer is expected to testify. (See Appellees' Second Set of Interrogatories to the Appellant attached hereto as **EXHIBIT "B"**.)

The Appellant did not serve a response to Appellees' Second Set of Interrogatories and by letter dated May 10, 2002, the Appellees made an attempt to gather responses to Appelles' Second Set of Interrogatories to the Appellant. (See May 10, 2002 letter attached hereto as **EXHIBIT "C"**.) Despite this follow-up letter, the Appellant never provided any information regarding his designated expert, Matthew Balmer. Apparently, Mr. Balmer is an electrical engineer. (See Kozar v. Sharp Electronics Corporation, Civil Action No. 04-901 (W.D. Pa. 2005) referencing Matthew Balmer as an electrical engineer and attached hereto as **EXHIBIT "D"**.)

On the 15th day of January, 2003, the Appellees filed their Pre-Trial Memorandum along with "Defendants' Motion to Strike Plaintiff's Expert Matthew Balmer". The

Motion to exclude Mr. Balmer was based primarily upon the Appellant's failure to provide any information regarding Mr. Balmer's prospective testimony. On January 16, 2003, the Appellant filed his Pre-Trial Information Sheet wherein he designated his trial witnesses. Apparently, the Appellant decided not to use Mr. Balmer as a witness because he was not listed as one of Appellant's trial witnesses.[1]

Following participation by all parties in the pre-trial hearing on January 16, 2003, it became obvious that the Appellant would not have sufficient evidence to prove his cause of action against the Appellees without an application of the doctrine of *res ipsa loquitur* if it applied to the facts of the case.

Therefore, the February 4, 2003 trial "was continued based upon the motion of [Appellant,] David R. Kyle, which was not opposed by the [Appellees.]" (See Order entered February 20, 2003.) The parties agreed to stipulate to certain facts which are contained in the Agreed Order entered February 20, 2003, and submit briefs and argument regarding whether or not the Appellant can rely upon the doctrine of *res ipsa loquitur* considering the stipulated facts which were, by agreement, those most favorable to the Appellant.

Following briefs and arguments by the parties, the Court entered its Final Order on the 6th day of January, 2006, granting judgment in favor of the Appellees and dismissing this action, with prejudice.[2] All parties agreed when they executed the Order entered February 20, 2003 that if the Circuit Court did not rule in favor of the Appellant regarding the application of the doctrine of *res ipsa loquitur*, the Appellant's case would be dismissed, with prejudice. Therefore, although a formal motion for summary judgment was not filed, the parties had stipulated to certain facts without the necessity of

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1 The Appellant did designate Dr. Dan Stewart as an expert witness for the first time in his Pre-Trial Information Sheet. However, this expert witness was listed as "expert witness on plastic surgery."

2 The Appellant asserts in his Brief that a Writ of Mandamus was granted against the Honorable N. Edward Eagloski; however, a Rule to Show Cause was issued but the Petition for Writ of Mandamus was dismissed without a Writ of Mandamus being issued.

trial and asked the trial court to make a ruling regarding those particular facts in order to determine whether a trial by jury was necessary.

II. Statement of Facts

The parties stipulated to facts by written Order signed by the Court. Therefore, the facts as stipulated are not in dispute. Further, because the Appellant cited additional deposition testimony in his Appellant's Brief, the Appellees must cite additional deposition testimony in opposition.

The Appellant referenced in his oral presentation of the Petition for Appeal to this Honorable Court that he had planned to proffer himself as an expert witness in this case. However, the Appellant was never identified as an expert witness. Further, even assuming arguendo that the Appellant could proffer himself as an expert witness, he has no testimony or knowledge that would be of assistance to a trier of fact. The Appellant testified as follows regarding his knowledge of what happened:

Q. What do you think happened?

A. I don't know.

Q. Do you have any idea?

A. No idea. No idea.

Q. What did not having the power disconnected have to do with your injury, other than the obvious, that if the power hadn't been connected there wouldn't have been an explosion?

A. That I don't know either.

Q. You didn't want the power disconnected to do what you were doing anyway, did you?

A. No, not really, because all I was going to do was change a breaker. If I was going to disconnect the whole thing, you know, say if I was

going to have to work on a main breaker or something like that, of course, you would have to have the power company come in and shut it down.

Q. Have you talked to anybody from the power company since this?

A. No.

(See pages 91-92 of the Deposition Transcript of David R. Kyle.)

Q. Do you know or do you have an opinion what Dana did that caused this accident?

A. No.

Q. What did Ronnie Dodrill do wrong, if anything? Do you know?

A. I don't know.

Q. In fact, you only saw Ronnie, what, once that day when he walked into the room before your - -

A. Yes.

Q. And he didn't tell you what to do?

A. No.

(See pages 94-95 of the Deposition Transcript of David R Kyle.)

The Appellant asserts in his Brief that neither party has been able to identify what caused the electrical panel to blow up in Appellant's face. (See page 2 of Appellant's Brief.) However, the Appellant, who carries the burden of proof, has been unable to identify any potential cause for the accident, but acknowledges the dangerous nature of the work he was performing. Specifically, the Appellant testified as follows:

Q. Right. The board was just the way you found it, and you did just what you were trying to do, and there wasn't an explosion. What is the next thing you would have done?

A. I would have tried to find the breaker they took out of it first and put it back in to cover it up.

Q. Why would you do that?

A. Just because of the danger. The fingers stick out of the panel, even with the covers on it. You know, a person is able to reach in and grab that.

Q. Were those fingers sticking out when you were tightening this screw with your screwdriver?

A. What I'm saying is, you know, they are there exposed. Yes, they were exposed.

Q. So there was an exposed hot connection?

A. Yes. Yes. And when I seen the screw that was loose, my thought is to tighten this before it falls off or into the other fingers.

(See pages 92-93 of the Deposition Transcript of David R. Kyle).

Q. What is shown is Exhibit No. 3?

A. It is the disconnect.

Q. What does it disconnect?

A. That I don't know.

Q. Do you agree - -

A. I have no idea what it would disconnect, just by looking at the picture. If I physically looked at it, maybe I could tell you.

Q. Have you been back to the Dana location?

A. No.

Q. Do you know if anybody from Al Marino went down after your injury and looked around?

A. I have no idea.

Q. Has anyone from Al Marino told you what they thought happened?

A. No.

Q. What do you think happened?

A. I don't know.

Q. Don't have any idea?

A. I have no idea.

Q. Did you have tools in your hand at the time this explosion took place?

A. Yes. I did.

Q. What did you have and in which hand?

A. Screwdriver.

Q. In which hand, your right hand?

A. Yes.

Q. Did you have a pair of needle-nose pliers in your left hand?

A. I may have.

Q. What was the position of your hands at the time the ball of fire exploded out of that box?

A. I had just tightened the screw down.

Q. With the screwdriver?

A. Yes.

Q. So your right hand was - -

A. My right hand was - -

Q. - - in the box?

A. Yes.

Q. Was the box hot?

A. Yes.

(See pages 65-66 of the Deposition Transcript of David R. Kyle.)

Q. But did you know it was hot? Did you know it was energized?

A. I asked. They said, Yes, it is energized.

Q. Who did you ask?

A. Whoever this guy was.

Q. Was it Ron Dodrill, the fellow that was here today?

A. No.

Q. Did Mr. Dodrill have anything to do with telling you what to do that day or where to work?

A. No.

Q. Did you rely on Mr. Dodrill for anything you did down at Dana the day of your accident?

A. No. I didn't even know who Mr. Dodrill was.

(See pages 66-67 of the Deposition Transcript of David R. Kyle.)

The Appellant cites deposition testimony from page 77 of Appellant's Deposition Transcript but does not provide the full testimony from page 77 when the Appellant testifies that he knew what he was doing was dangerous:

Q. But you know it is dangerous?

A. Sure. And you take precautions not to get into it.

(See lines 12 – 14 of page 77 of the Deposition Transcript of David R. Kyle.)

Clearly, from the Appellant's own testimony, as well as the facts stipulated by the parties, the only reasonable explanation as to why the Appellant was electrocuted was his own negligent conduct working in a charged breaker box with a screwdriver and needle-nose pliers. There simply is no other evidence from which a jury could infer negligence on the part of the Appellees which caused the Appellant's injuries.

III. Issue presented

Whether the trial court erred in ruling that Appellant was not entitled to present his case under a *res ipsa loquitur* theory?

IV. Argument

A. The Appellant did not present sufficient evidence that the event in this case was of a kind which ordinarily does not occur in the absence of Appellees' negligence.

Appellant asserts that the trial court's ruling that the Appellant failed to show that this accident was of a kind that would not have occurred in the absence of Appellees' negligence is inconsistent with common experience and contrary to numerous other courts and legal authorities. The Appellant cites Robison v. Cascade Hardwoods, Inc., 117 Wash. App. 552, 72 P. 3d 244 (2003), and St. Paul Companies v. Construction Management Co., 96 F. Supp. 1094 (D. Montana Butte Div. 2000). Both Robison and St.

Paul involved evidence which was different and more substantial than the evidence presented by the Appellant in this case. In Robison, the plaintiff utilized an electrical expert who eliminated certain causes for the electrical shock despite its exact origin being uncertain. Robison, 117 Wash. App. at 559. In the case *sub judice*, the Appellant does not have an expert witness and the Appellant himself cannot eliminate any potential causes of the electrical fire. Further, he cannot identify any potential causes for the electrical fire. Additionally, the Court in Robison noted that there was evidence of previous incidents of minor tingles, buzzes or electrical shocks from the defendant's property. Robison, 117 Wash. App. at 559-560.

Also, in the case *sub judice*, the Appellant was hired to perform maintenance on the Appellee, Dana Transport Inc.'s breaker box. While he was performing the work he was hired to do he was burned by the electrical fire. In contrast, the Robison Court found that the defendant had exclusive control over "the electrician's who performed maintenance and repairs to Cascade's electrical systems." Robison, 117 Wash. App. at 562. The electrical fire in this case occurred when the Appellant had exclusive control over the breaker box where the electrocution initiated.

In St. Paul, the plaintiff identified a potential cause of the fire which was not in any way the result of the conduct of the plaintiff. Again, in the case *sub judice*, there has not been any evidence presented by the Appellant as to a potential cause of the fire. Therefore, the evidence presented by the Appellant to the Trial Court in this case is conjecture and speculation that the accident was of a kind which ordinarily does not occur in the absence of Appellees' negligence.

Although the Appellant need not prove a specific instance of negligence which was the cause of the accident that injured him, he must present circumstantial evidence that will lead to reasonable inferences by the jury, and is not simply evidence which will force the jury to speculate in order to reach its conclusion. (See Beatty v. Ford Motor

Co., 212 W.Va. 471, 574 S.E.2d 803 (2002) stating "the test set forth in *Foster* allows a trial court to make a preliminary determination that the evidence that a plaintiff intends to present is indeed circumstantial evidence that will lead to reasonable inferences by the jury, and is not simply evidence which will force the jury to speculate in order to reach its conclusion.")

In Beatty, the Court found that "there is a substantial possibility that the rain soaked highway and/or the appellant's carelessness in operating the van may have been, at the very least, a contributing factor to the accident. Accordingly, the appellant has not shown that the accident was of a kind that ordinarily would not have occurred in the absence of the appellee's negligence." Beatty, 212 W.Va. at 476. In the case *sub judice*, the Appellant has not presented any circumstantial evidence that would lead to a reasonable inference that the accident was of a kind that ordinarily would not have occurred in the absence of the Appellees' negligence. Therefore, a jury would be forced to speculate in order to reach its conclusion in this matter. The Appellant has not proposed any scenario under which the negligence of the Appellees is a potential cause of the accident. He has also not presented any evidence to exclude other potential causes of the accident, including his own careless conduct.

B. Other responsible causes, including the conduct of Appellant and third persons, are not sufficiently eliminated by the Appellant's evidence.

Although this Court set forth a new test regarding the application of *res ipsa loquitur* in Foster, the Court did not completely abandon the prior law in West Virginia regarding negligence and *res ipsa loquitur*. Subsequent to Foster, the West Virginia Supreme Court of Appeals has addressed two separate cases which involved the evidentiary rule of *res ipsa loquitur*.

In Beatty v. Ford Motor Company, 212 W.Va. 471, 574 S.E.2d 803 (2002), this Court upheld a summary judgment order in favor of the defendants despite the assertion

by the plaintiff of the evidentiary rule of *res ipsa loquitur*. In Beatty, the Court stated that "[i]t is, however, 'clearly an incorrect statement of the law' to say that *res ipsa loquitur* 'dispense[s] with the requirement that negligence must be proved by him who alleges it.'" Beatty, 212 W.Va. at 476 citing Peneschi v. National Steel Corp., 170 W.Va. 511, 520, 295 S.E.2d 1, 10 (1982).

In Mrotek v. Coal River Canoe Livery, Ltd., this Court noted that it "has observed that '[i]t is an elementary principal of law that negligence will not be imputed or presumed. The bare fact of an injury standing alone, without supporting evidence, is not sufficient to justify an inference of negligence.'" Mrotek v. Coal River Canoe Livery, Ltd., 214 W.Va. 490, 492, 590 S.E.2d 683, ____ (2003) citing Walton v. Given, 158 W.Va. 897, 902, 215 S.E.2d 647, 651 (1975). In Footnote 4 of Mrotek, this Court upheld the circuit court's summary judgment ruling despite the assertion of *res ipsa loquitur* and cited Syl. Pt. 2 of Farley v. Meadows, 185 W.Va. 48, 404 S.E.2d 537 (1991) which states the following:

> The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.

In the case *sub judice*, the Appellant moved the Trial Court to address the issue of *res ipsa loquitur* without the necessity of a trial thereby consenting to a summary judgment procedure regarding whether he can rely upon the doctrine of *res ipsa loquitur*. Clearly, under West Virginia law, the Trial Court, in its discretion, had authority to enter summary judgment in favor of the Appellees where the existence of negligence is wholly a matter of conjecture or when it may be inferred there was no negligence on the part of the Appellees. (See Footnote 13 of Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (1997) stating that "Circuit courts will have to take a common-sense approach and

apply the principles in the *Restatement* formulation in a practical fashion on a case-by-case basis – and in light of our past cases, insofar as they are consistent with the *Restatement* formulation. And we will have to afford circuit courts a reasonable discretion as they do so.") The Appellant asserts in his brief that the Appellant's own negligence as a cause of the accident is "merely speculation," but fails to acknowledge that he has no explanation as to a potential cause of the accident. How can the Appellees' explanation as to the potential cause of the accident be speculation but the Appellant's failure to identify any potential cause not be speculation?

The evidentiary rule of *res ipsa loquitur* has been used by at least one court against a person in the same position as the Appellant. In Nat'l Sur. Corp. v. Travelers Ins. Co., 149 So.2d 438 (La Ct. App. 1963), National Surety Corporation brought suit as subrogee of its insured, W.R. Aldrich & Company (property owner) to recover damages to its property caused by a fire which it alleged was the result of the negligence of a contractor's employee (*i.e.* appellant). The third party contractor's employee was on the property owner's premises to perform work as a welder when a fire started approximately six feet from where the contractor's employee was welding. Nat'l Sur. Corp., 149 So.2d at 440.

The trial court found as follows:

> [T]he instrumentality was under the actual control of [the contractor's employee] at the time the fire started so that he was in a position to have superior knowledge of the cause of the flame. The fact that the loader (machinery on which the contractor's employee was working) was on the construction site, rather than in defendant's shop, does not negative control by [contractor's employee]. [The property owners'] employees had left the scene and [the contractor's employee] alone was in control and in a position to have knowledge of the cause of the accident. Also, it is apparent that this accident is of a kind which ordinarily does not occur in the absence of negligence. The spark which started the fire had to come from somewhere. There is no evidence of any other spark or cause of ignition of the fire, except the welding torch. Id. at 440-441.

In the case *sub judice*, there is no evidence of any other source of negligence which may have caused the electrical fire other than the Appellant's contact with the charged breaker box.[3]

The Appellant relies upon the Sixth Circuit Court of Appeals case of Morris v. Wal-Mart Stores, Inc., 330 F.3d 855 (6th Cir. 2003) which involved a factual scenario far different from the one in the case *sub judice*. In Morris, the Court of Appeals overturned the trial court's dismissal of the action because the evidence, viewed most favorably to the plaintiff, established that the plaintiff slipped and fell on water that leaked from a spot box freezer in Wal-Mart. The plaintiff, a customer, testified that the store manager communicated to her that it was his belief that the liquid substance present on the floor was water that had leaked from the spot box freezer. Further, the manager pointed out to plaintiff that the plug on the bottom of the spot box freezer was out. Morris, 330 F.3d at 856-857. The spot box freezer was in no way under the control of the plaintiff, nor was she hired to perform work on the spot box freezer. It was a reasonable inference from that evidence that Wal-Mart by and through its employees failed to place a plug in the spot box freezer which led directly to water leaking on the floor where customers are known to travel. In contrast, the Appellant in this case cannot identify any potential negligence of the Appellees nor can he identify any potential cause for his electrocution.

The Morris Court cited Provident Life & Accident Ins. Co. v. Prof'l Cleaning Serv., Inc., 217 Tenn. 199, 396 S.W.2d 351 (1965) which clearly instructs that " [t]he general rule for all cases of circumstantial evidence – both ordinary cases and *res ipsa loquitur* cases – is that to make out his case, plaintiff does not have to eliminate all other possible causes or inferences than that of defendant's negligence; but it is enough if the evidence for him makes such negligence more probable than any other cause." Provident, 396 S.W.2d at 356. In the case at hand, the Appellant's evidence does not

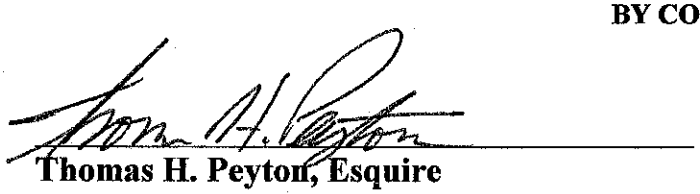
[3] The Court will note that the Appellant cited Nat'l Sur. Corp. v. Travelers Ins. Co. in his Petition for Appeal but omitted the same from the Brief of the Appellant.

make the Appellees' negligence more probable than any other cause. In fact, he has not eliminated any other possible causes nor identified any possible causes for the accident. The only reasonable inference regarding the cause of the accident is the negligence of the Appellant himself.

V. Conclusion

For the foregoing reasons, the Appellees, Dana Transport, Inc. and Ronnie Dodrill, respectfully request that this Honorable Court deny the Appellant's appeal and affirm the Trial Court's ruling in this matter dismissing the case with prejudice.

DANA TRANSPORT, INC.
and RONNIE DODRILL
BY COUNSEL



Thomas H. Peyton, Esquire
PEYTON LAW FIRM
Post Office Box 216
2801 First Avenue
Nitro, WV 25143
WV State Bar No. 8841
Telephone: (304) 755-5556
Telefax: (304) 755-1255
Counsel for Appellees

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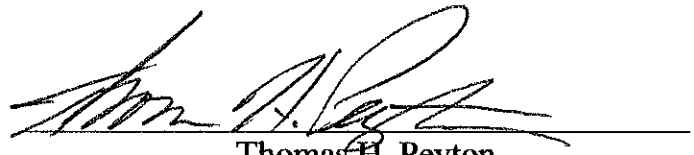
CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for Appellees, Dana Transport, Inc. and Ronnie Dodrill, do hereby certify that the foregoing "BRIEF OF APPELLEES" was served upon the following counsel of record by placing a true and accurate copy thereof in a properly addressed envelope and depositing the same in the United States Mail, first class postage prepaid, this 14th day of November, 2006:

Heather M Langeland, Esquire
Lonnie C. Simmons, Esquire
DiTrapano, Barrett & DiPiero, PLLC
604 Virginia Street, East
Charleston, WV 25301



Thomas H. Peyton